

RECEIVED  
CENTRAL FAX CENTER  
OCT 25 2006

### REMARKS

Herein the claims are returned to their original condition, after a conclusion that they were improvidently narrowed.

This amendment could not have been made earlier because the necessity for it was only appreciated after a review of the latest office action. This amendment should not require further consideration, because these claims have already been examined. Entry is therefore respectfully requested.

#### Rejections under section 112

The rejection under section 112 in the current office action should be moot as the claims to which it relate have been cancelled.

The rejections under section 112 from the prior action are respectfully traversed.

#### Reciting the medium

The requirement that the medium be recited positively is respectfully traversed as without basis in law. The case of Special Equipment v. Coe, 324 US 370 (1945) decided that subassemblies could be claimed. The fact that a holder is adapted to hold a medium does not mean that the medium must be claimed.

Also since the holder can be distributed separately from the medium that it is designed to hold, it is in fact a useful product in and of itself. Adding a recitation of the medium would limit the Applicant's ability to enforce the patent against the holder. Such

C:\Documents and Settings\Owner\My Documents\Legal\gb020130\gb020130 -- 116.doc

4

RECEIVED  
CENTRAL FAX CENTER

OCT 25 2006

## REMARKS

a limitation is not justified by the art, as the art shows the prior art holders with their media, so adding the media would not distinguish over them.

Standard size

The Examiner previously argued that credit cards and business cards do not have a standard size.

The undersigned just turned 50 years old. During her life she has handled and otherwise observed a fair number of credit/debit cards. She has always observed credit or debit cards to be exactly the same size. She successfully inserts her credit/debit cards into machines all over the country and they always fit. She has even taken a US ATM card and inserted it successfully in ATM machines in Canada and The Netherlands. She could not have done this if these cards were not a standard size. The undersigned has also seen credit cards being used by tourists from all over the world here in the NY metro area, and all those credit cards are exactly the same size, again because otherwise they could not be used in the machines that are intended to receive them.

Similarly, the undersigned has observed that business cards in this country are always the same size. She has even seen very fancy metal business card holders -- sold in upscale stores -- that fit standard business cards to within less than a millimeter, and all business cards fit exactly in those same holders. Only a very odd person, such as perhaps a craftsperson trying to demonstrate how very artsy-craftsy he or she was, would have

C:\Documents and Settings\Owner\My Documents\Legal\gb020130\gb020130 -- 116.doc

5

RECEIVED  
CENTRAL FAX CENTER

OCT 25 2006

REMARKS

different sized business cards, because different sized business cards would not fit into standard business card holders — and even then everyone handling the non-standard sized business cards distributed by the artsy-craftsy person would immediately understand that those were non-standard cards and therefore a statement of rebellion or creativity.

Also wallets and rolodexes are designed to hold business and credit/debit cards.

The undersigned did observe that business cards in Europe were a slightly different size from the US, but even then all business cards in Europe were the same size as each other.

Applicant accordingly respectfully traverses the Examiner's allegation that the term "standard size" in the claims is not definite.

Art rejections

The art rejections of the original claims, as set forth in the prior office action are respectfully traversed.

Patentability of size

It is to be imagined why the Examiner wonders, "Why is size patentable here? After all, things come in different sizes." The answer is that this particular size, the size of a standard credit card or standard business card, is indeed a standard size. There are

C:\Documents and Settings\Owner\My Documents\Legal\gb020130\gb020130 -- 116.doc

6

RECEIVED  
CENTRAL FAX CENTER

OCT 25 2006

REMARKS

already a plethora of wallets and card holders made to carry things of this size. When a medium is placed on a holder as recited in the claim, the medium can be safely placed in one of these ubiquitous convenient devices. This was not possible with prior devices. Indeed, it is not so easy with current devices either. The undersigned recently purchased a small flash drive from Staples and was then at a loss where to store it so that neither the drive nor its cap would get lost or damaged and yet be always conveniently at hand. The undersigned does carry a purse with a number of zippered pockets and pouches into which the drive can be inserted, thus begging the later question of which pouch the undersigned has chosen for the tiny drive, resulting in the potential for searching expeditions and repeatedly dumping out the purse – not to mention possible loss of the protective cap. The undersigned never, however, has this problem with credit/debit cards, which are so conveniently organized in her wallet, along with her driver's license and health insurance card – all of which are exactly the same size, so that they fit in the little credit card slots and do not fall out, and, moreover, the undersigned takes especial care never to lose the wallet, precisely because of its special concentration of important identically sized cards. Accordingly, a medium would be ever so much more useful and convenient if it were stored in a credit card sized holder.

The primary reference relates to a holder for standard DVD's. The undersigned has also handled a fair number of standard DVD's. These are also a standard size. Each DVD fits in all DVD players. However, a DVD would not fit on a holder that was the

C:\Documents and Settings\Owner\My Documents\Legal\gb020130\gb020130 -- 116.doc

7

OCT 25 2006

## REMARKS

size of a standard credit card or business card. Such a holder would be too small for a DVD. If the Examiner were to take a standard credit card and a standard DVD as shown in the reference and show both to a kindergartener, and ask the latter if the DVD would fit on the credit card, the child would laugh at the Examiner. Accordingly, the holder of the reference cannot be interpreted to teach or suggest the size of a standard credit or business card.

The law regarding size and patentability has somewhat been discussed in the prior response. Applicant would like to supplement that discussion here.

With respect to the Rose case, it should be understood that the case points out that the decision of lack of patentability rests not only on the issue of size, but also on the fact that the features considered in that case performed in combination the same function as set forth in the prior art.

Similarly, Gardner v. Tec Systems, 725 F. 2d 1338, 220 USPQ 777 (Fed. Cir. 1984) also cited by 2100 MPEP 2144.04 concluded that size did not confer patentability where "structural differences over the prior art do not necessarily result in differences in performance over the prior art." 725 F. 2d at 1345-6 and "did not produce any discernible result or any synergistic effect" 725 F. 2d at 1346. The court found that "the dimensional limitations ... failed to particularly point out a feature ... which performed any differently from prior art ... in other words, those limitations are a verbal difference only." The clear implication here is that a dimensional limitation could convey a

C:\Documents and Settings\Owner\My Documents\Legal\gb020130\gb020130 -- 116.doc

RECEIVED  
CENTRAL FAX CENTER

OCT 25 2006

REMARKS

patentable distinction — if a difference in performance, discernible result, or synergistic effect were produced.

Similarly a recent scholarly article, R. Scott Roe, "Note: Nanotechnology: When Making Something Smaller Is Nonobvious," 12 B.U. J. SCI. & TECH. L. 127 (2006) has argued that size does in fact convey patentability in certain circumstances.

The undersigned has also located Ex parte Luan Tran et al., cited in the prior amendment, a copy of which is available on the PTO website. A copy of that decision is now hopefully attached. It is stated to be a non-precedential decision; however, the topic of whether adjudicatory bodies can actually legally make their decisions non-precedential is controversial. Enclosed is a copy of an ABA article from [www.nonpublication.com](http://www.nonpublication.com) including some case law indicating that courts may not make their decisions non-precedential. According to this website, the Supreme Court decided on April 12, 2006 that by December 1 all federal cases will be citable in federal courts. In any case, the board case does at least illustrate that the board does sometimes allow patents based on size.

In the present invention, the function of being a standard size, a size that is in fact adapted to the ubiquitous standard carrying devices of our culture, is indeed a difference in performance, discernible result, or synergistic effect, as discussed in the case law. This performance, result, and effect are not taught or suggested in the prior art and indeed are not even possible with a DVD as shown in the primary reference.

C:\Documents and Settings\Owner\My Documents\Legal\gb020130\gb020130 -- 116.doc

9

RECEIVED  
CENTRAL FAX CENTER  
OCT 25 2006

### REMARKS

Reconsideration of the rejection is accordingly respectfully requested.

#### Claim 14 (formerly 5)

This claim recites: a holder according to claim 13 wherein the planar area of the holder is at least 100% greater than the planar area of the computer readable storage medium. An example of this feature is illustrated in Fig. 3 of the application. This feature has the functional advantage, as illustrated in the figure, that two media can be placed side by side on the holder, as shown in the figure.

Against the recitations of this claim, the Examiner has stated again that size is not patentable. However, again the functional advantage of this particular size is not taught or suggested by the reference. Accordingly, this limitation does distinguish patentably over the reference.

Any of the Examiner's rejections and/or points of argument that are not addressed above would appear to be moot in view of the following. Nevertheless, Applicant reserves the right to respond to those rejections and arguments and to advance additional arguments at a later date. No arguments are waived and none of the Examiner's statements are conceded.

**RECEIVED  
CENTRAL FAX CENTER****OCT 25 2006****REMARKS****Information Disclosure**

Applicants note that two documents listed in a prior information disclosure were never made of record. Applicants accordingly submit them herewith along with a PTO/SB/8a form. Applicants recognize that information disclosures are not normally allowed after a final rejection; however, given that this is just a submission of material previously listed in an information disclosure and inadvertently omitted, Applicants respectfully submit that the Examiner can make the documents of record. Such action is accordingly respectfully requested. The pertinence of these two documents is set forth in the International Search report, a copy of which is also enclosed.

*Please charge any fees other than the issue fee to deposit account 14-1270.*

*Please credit any overpayments to the same account.*



**RECEIVED  
CENTRAL FAX CENTER****OCT 25 2006****REMARKS**

Applicant respectfully submits that he has addressed each issue raised by the Examiner — except for any that were skipped as moot — and that the application is accordingly in condition for allowance. Allowance is therefore respectfully requested.

Respectfully submitted,

By 

Anne E. Barschall, Reg. No. 31,089

Tel. no. 914-332-1019

Fax no. 914-332-7719

Date of printing: October 25, 2006

In house contact at assignee:

Michael Belk

Reg. No. 33,357

Tel. # 914-333-9643

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

***Ex parte*** LUAN TRAN, D. MARK DURCAN, TYLER A. LOWREY,  
ROB B. KERR, and KRIS K. BROWN

Appeal No. 2005-2155  
Application No. 10/059,727

ON BRIEF

Before HAIRSTON, GROSS, and NAPPI, ***Administrative Patent Judges.***  
GROSS, ***Administrative Patent Judge.***

***DECISION ON APPEAL***

This is a decision on appeal from the examiner's final rejection of claims 1 through 8 and 10 through 25.

Appellants' invention relates to a semiconductor memory array. Claim 11 is illustrative of the claimed invention, and it reads as follows:

11. A memory device comprising:  
memory cells each having an area of about  $6F^2$ ;  
sense amplifiers;  
bit lines coupled to the sense amplifiers in a folded bit line arrangement;

Appeal No. 2005-2155  
Application No. 10/059,727

active area lines; and

transistors formed in the active area lines and electrically coupling corresponding memory cells to corresponding bit lines.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Chu et al. (Chu)	5,107,459	Apr. 21, 1992
Aoki et al. (Aoki)	5,747,844	May 05, 1998

Claims 1 through 8 and 10 through 25 stand rejected under 35 U.S.C. § 103 as being unpatentable over Aoki in view of Chu.

Reference is made to the Examiner's Answer (Paper No. 12, mailed March 9, 2004) for the examiner's complete reasoning in support of the rejection, and to appellants' Brief (Paper No. 10, filed November 20, 2003) and Reply Brief (filed May 10, 2004) for appellants' arguments thereagainst.

#### **OPINION**

We have carefully considered the claims, the applied prior art references, and the respective positions articulated by appellants and the examiner. As a consequence of our review, we will reverse the obviousness rejection of claims 1 through 8 and 10 through 25.

Appellants argue (Brief, page 13) that Aoki teaches that folded bit line arrangements are space inefficient and chooses an

Appeal No. 2005-2155  
Application No. 10/059,727

open bit line configuration instead. Appellants continue (Brief, page 14) that Aoki did not recognize that a  $6F^2$  memory cell could be achieved with a folded bit line arrangement, nor did Chu suggest such. Therefore, appellants conclude (Brief, page 14) that a prima facie case of obviousness has not been established. We agree.

The examiner (Answer, pages 3-4) relies primarily on Aoki, adding Chu for bit lines including first and second level portions that are vertically separated from one another. The examiner admits (Answer, page 4) that Aoki fails to disclose a dimension of  $6F^2$  for a folded bit line configuration. The examiner asserts (Answer, page 4) that such dimensions were known, as disclosed by Keeth, which is not included in the statement of the rejection. The examiner concludes (Answer, page 4) that it would have been obvious to "scale a folded bit line to a smaller size for the purpose, for example, of enhancing the integration density of the MOS device."

The Court in *In re Hoch*, 428 F.2d 1341, n. 3, 166 USPQ 406, n. 3 (CCPA 1970), held that "[w]here a reference is relied on to support a rejection, whether or not in a 'minor capacity,' there would appear to be no excuse for not positively including the reference in the statement of rejection." The Court affirmed the

Appeal No. 2005-2155  
Application No. 10/059,727

rejection in that case because the references relied upon but not included in the statement of the rejection were not needed to meet the limitations of the claims. Here, however, the examiner relies upon Keeth (Answer, pages 4, 6, and 7) and Mori (Answer, page 7) to show the inventive concept (i.e., in a major capacity), without including them in the statement of the rejection. Thus, in accordance with *Hoch*, we will not consider Keeth or Mori, as they are not properly before us.

In the Response to Arguments section of the Answer, the examiner states (Answer, page 6), "The size dimension in this application cannot be considered the sole determining factor for patentability." The examiner relies on *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955), and *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), as support for the proposition that a difference in size is not patentable. The examiner explains (Answer, page 7) that the Court in *Gardner* held that merely a difference in size with no difference in performance is not patentably distinct from the prior. The examiner asserts in the next paragraph that "[t]here is no argument that the claimed 6F<sup>2</sup> device will function in a different manner than the 8F<sup>2</sup> device of Aoki." We disagree with the

Appeal No. 2005-2155  
Application No. 10/059,727

examiner's assumptions. Appellants argue (Reply Brief, pages 5-6) that the  $6F^2$  device will function differently than the  $8F^2$  device. Therefore, the difference in dimension can render the claims patentably distinct over the prior art.

Without Keeth and Mori, we find nothing in either Aoki or Chu, nor any convincing explanation in the Examiner's Answer, that would suggest a folded bit line configuration with a  $6F^2$  dimension. Therefore, we cannot sustain the rejection of independent claims 1, 11, 18, and 19, all of which recite memory cells having an area of about  $6F^2$  in a folded bit line arrangement, nor of their dependents, claims 2 through 8, 10, 12 through 17, and 20 through 25.

Appeal No. 2005-2155  
Application No. 10/059,727

**CONCLUSION**

The decision of the examiner rejecting claims 1 through 8  
and 10 through 25 under 35 U.S.C. § 103 is reversed.

**REVERSED**

KENNETH W. HAIRSTON	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
ANITA PELLMAN GROSS	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
ROBERT NAPPI	)	
Administrative Patent Judge	)	

AGP/rwk

Appeal No. 2005-2155  
Application No. 10/059,727

Timothy N. Trop  
TROP, PRUNER, HU & MILES  
Suite 100  
8554 Katy Freeway  
Houston, TX 77024



**AMERICAN BAR ASSOCIATION**  
**SECTION OF LITIGATION**  
**CRIMINAL JUSTICE SECTION**  
**TORT AND INSURANCE PRACTICE SECTION**  
**SENIOR LAWYERS DIVISION**  
**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1       RESOLVED THAT the American Bar Association opposes the practice of various  
2 federal courts of appeal in prohibiting citation to or reliance upon their unpublished opinions  
3 as contrary to the best interests of the public and the legal profession.  
4

5       FURTHER RESOLVED THAT the American Bar Association urges the federal courts of  
6 appeals uniformly to:  
7

- 8       1)     Take all necessary steps to make their unpublished decisions available through  
9             print or electronic publications, publicly accessible media sites, CD-ROMs,  
10            and/or Internet Websites; and  
11  
12       2)     Permit citation to relevant unpublished opinions.  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33

DRAFT – March 30, 2001

REPORT ON RECOMMENDATION FOR PUBLICATION AND RELIANCE UPON  
UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS

As the number of cases heard and decided by federal appellate courts increased, without a concomitant increase in staffing, funding, or judicial resources, the courts adopted rules concerning the publication and non-publication of their decisions, and set parameters concerning the use and effect of and citation to unpublished decisions. Generally speaking, the approach favored by the federal courts of appeals has been to give the courts discretion in deciding which cases to publish in official case reporters, and which cases not to publish. The appellate courts also have discretion to determine whether, to what extent, and for what purposes their unpublished decisions may be cited. A slim majority of federal appellate courts has adopted a companion principle, which is that decisions not designated for publication not only do not constitute binding precedent, but cannot even be cited for their possible persuasive value.

This Report provides an overview and summary of federal courts of appeals rules concerning litigants' ability (or inability) to cite unpublished opinions and the effect, if any, to be given by the courts to such unpublished decisions. The Report examines the historic rationale for such rules and addresses the continued vitality of these rationales. The Report concludes that the justifications for rules prohibiting citation to unpublished federal appellate decisions no longer carry substantial weight, and that the ABA should support a recommendation that all federal appellate courts (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet websites; and (2) permit citation to relevant unpublished opinions.<sup>1</sup>

1. Overview of Federal Appellate Court Rules Concerning Citations to  
Unpublished Decisions or Orders

All of the federal courts of appeals have rules governing citation to unpublished decisions or orders. These rules fall into two general categories.

The first category consists of rules that prohibit the citation to unpublished decisions except for purposes of establishing the doctrines of the law of the case, *res judicata* or collateral estoppel. The Federal, District of Columbia, First, Second, Seventh, Eighth and Ninth Circuits, as well as the Federal Court of Claims, have such rules.<sup>2</sup>

<sup>1</sup> The Report and Recommendation do not address the threshold issue of publication of appellate decisions or the criteria employed by courts in making decisions concerning publication.

<sup>2</sup> See Fed. Cir. R. 47.6(b); D.C. Cir. R. 28(c); 1<sup>st</sup> Cir. R. 36(2)(F); 2<sup>d</sup> Cir. R. 0.23; 7<sup>th</sup> Cir. R. 53(b)(2)(iv); 8<sup>th</sup> Cir. R. 28A(i); 9<sup>th</sup> Cir. R. 36-3; Fed. Ct. Cl. R. 52.1. But see discussion *infra* at 3.A. concerning the Eighth Circuit's recent decision concerning the constitutionality of its rule.

DRAFT – March 30, 2001

The Court of Appeals for the District of Columbia goes further in prohibiting citation not only to the court's own unpublished decisions, but to unpublished decisions from other courts as well, unless the particular court considers its unpublished decisions to be precedential.<sup>3</sup>

The second category consists of rules that disfavor the citation to unpublished decisions, but allow citation if counsel believes that the decision has precedential value in relation to a material issue in a case and if there is no published opinion that would serve as well. The rules require that counsel must provide a copy of the unpublished opinion to the court. The Fourth, Fifth, Sixth, Tenth and Eleventh Circuits take this approach.<sup>4</sup>

Finally, the Third Circuit simply states that it will itself not cite to any of its unpublished opinions because they are not precedent.<sup>5</sup> However, the Third Circuit does not place any restrictions on the ability of parties to cite to unpublished decisions.<sup>6</sup>

In addition to the federal court rules, the American Bar Association's Standing Committee on Ethics states that it is:

ethically improper for a lawyer to cite to a court an unpublished opinion . . . where the forum court has a specific rule prohibiting any reference in briefs to an opinion . . . marked . . . 'not for publication.'<sup>7</sup>

## 2. Origins of and Rationale for Rules Restricting Effect of and Citation to Unpublished Decisions or Orders

<sup>3</sup> See D.C. Cir. R. 28(c).

<sup>4</sup> See 4<sup>th</sup> Cir. R. 36(e); 5<sup>th</sup> Cir. R. 47.5; 6<sup>th</sup> Cir. R. 24(c); 10<sup>th</sup> Cir. R. 36.3; 11<sup>th</sup> Cir. R. 36-2; *see also* Report of the Committee on Federal Courts on the Second Circuit's Rule Regarding Citation of Summary Orders (July 17, 1998), discussed *infra* at 3.C, in which the Committee on Federal Courts recommends that the Second Circuit adopt a rule governing citation to unpublished summary orders similar to the rules in the Fourth, Sixth and Tenth Circuits.

<sup>5</sup> 3d Cir. IOP 5.8.

<sup>6</sup> See 3d Cir. R. 28.3 ("Citations to federal decisions that have not been formally reported shall identify the court, docket number and date, and refer to the electronically transmitted decision.").

<sup>7</sup> ABA Formal Op. 94-386R.

DRAFT – March 30, 2001

The origin of rules restricting citation to unpublished decisions is linked to the determination that certain opinions should not be published.<sup>8</sup> Up to and through the 1960's and 1970's, the vast majority of decisions from federal courts, even one-word Memorandum Decisions, routinely were published.<sup>9</sup> However, that same period experienced a significant increase in the number of opinions being handed down by the federal courts.<sup>10</sup> In 1964 the Judicial Conference of the United States expressed concern over the number of published opinions that might impose unreasonable costs and practical difficulties in maintaining access to the published reports.<sup>11</sup> Thus, the Judicial Conference recommended that the federal courts of appeals publish "only those opinions which are of general precedential value."<sup>12</sup> In 1971 the Federal Judicial Center issued a report which further highlighted the problems faced by the federal courts due to the increasing caseload.<sup>13</sup> In 1972, the Judicial Conference directed the federal circuits to develop plans to limit the publication of opinions, which eventually resulted in the current rules in the federal courts.<sup>14</sup>

The concern over the number of opinions generally is expressed in two ways. First, as the amount of decisions increases, so too does the cost of publishing, disseminating and researching them.<sup>15</sup> There was a fear that the increased costs will be passed on to the consumer of legal services, resulting in inequities as only those who can afford to pay these high costs will obtain the best legal advice.<sup>16</sup>

<sup>8</sup> For an in-depth discussion of the history and rationale for unpublished opinions, see Donna Stienstra, Federal Judicial Center, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (1985); William L. Reynolds and William M. Richman, The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978) ("Reynolds and Richman I"); William L. Reynolds and William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U.Chi. L. Rev. 573 (1981) ("Reynolds and Richman II").

<sup>9</sup> Kurt Shuldberg, Digital Influence: Technology and Unpublished Opinions in the federal courts of appeals, 85 Calif. L. Rev. 541, 546 (1997); Donald R. Songer, Criteria for Publication in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 308 (1990) ("It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small.").

<sup>10</sup> Hon. Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 Ohio St. L.J. 177, 181-85 (1999).

<sup>11</sup> Report of the Proceedings of the Judicial Conference of the United States 11 (1964).

<sup>12</sup> *Id.*

<sup>13</sup> William L. Reynolds and William M. Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L.J. 806, 808 (1979).

<sup>14</sup> Report of the Proceedings of the Judicial Conference of the United States 33 (1972).

<sup>15</sup> Shuldberg, *supra* note 9, at 547-48.

<sup>16</sup> Reynolds and Richman I, *supra* note 8, at 1188-89.

DRAFT – March 30, 2001

1  
2 As the number of federal cases grew, federal judges and their clerks indicated that  
3 they were unable to keep up with and resolve their caseloads in a timely manner. Thus, a second  
4 concern was that the efficiency of the federal court system would be compromised by the need to  
5 publish every single decision, no matter how unimportant.<sup>17</sup> By selectively publishing opinions,  
6 judges could spend less time writing opinions and more time resolving a larger number of  
7 cases.<sup>18</sup> Moreover, in the interests of judicial efficiency, courts should spend more time on  
8 published opinions that substantially advance the state of the law, and not publish opinions that  
9 only resolve a dispute between litigants.<sup>19</sup>

10  
11 Having made the determination not to publish certain decisions, it quickly was  
12 decided that citation to these decisions should be restricted. It was argued that unfettered citation  
13 to unpublished decisions would substantially undermine the purposes of selective publication –  
14 reduction of costs and increased judicial efficiency.<sup>20</sup> If litigants could cite to unpublished  
15 decisions, the parties and the court still would have to spend time researching these cases.<sup>21</sup>  
16 Alternate collections of these decisions would develop and practitioners and law libraries would  
17 have to invest funds to keep abreast of these collections. Judicial efficiency also would suffer.  
18 the argument went, because judges would feel compelled to spend more time writing opinions  
19 that they know were going to be cited anyway.<sup>22</sup>

20  
21 In addition, there was a concern that allowing citation to unpublished decisions  
22 was unfair because certain litigants would have more access to the body of unpublished opinions  
23 than others.<sup>23</sup> For example, attorneys with greater time and resources would more easily be able  
24 to bear the costs of researching and maintaining collections of the decisions, and frequent  
25 litigants, such as the government, would have access to a greater number of unpublished opinions

---

<sup>17</sup> Shuldberg, *supra* note 9, at 548; Martin, *supra* note 10, at 190; Joiner, Limiting Publication of Judicial Opinions, 56 *Judicature* 195, 196 (1972).

<sup>18</sup> Martin, *supra* note 10, at 190; George M. Weaver, The Precedential Value of Unpublished Judicial Opinions, 39 *Mercer L. Rev.* 477, 479 (1986).

<sup>19</sup> Richard A. Posner, The Federal Courts: Crisis and Reform, 124 (1985); Comm. on the Use of Appellate Court Energies, Advisory Council for Appellate Justice, FJC Research Series No. 73-2, Standards for Publication of Judicial Opinions 5 (1973).

<sup>20</sup> Reynolds and Richman I, *supra* note 8, at 1186-87.

<sup>21</sup> Shuldberg, *supra* note 9, at 550; Martin, *supra* note 10, at 190.

<sup>22</sup> Shuldberg, *supra* note 9, at 550.

<sup>23</sup> *Id.*

DRAFT – March 30, 2001

issued in the numerous cases in which they are involved.<sup>24</sup> The argument was that citation to unpublished decisions should be restricted so that these attorneys and litigants did not have an unfair advantage over smaller or less well-funded parties.

3. Bases for Recommending Changes to Rules Restricting Effect of  
and Citation to Unpublished Decisions

Many of the stated justifications for rules limiting or prohibiting citation of unpublished decisions deserve renewed scrutiny today, especially in view of technological developments that have made the availability and accessibility of unpublished decisions more widespread and easier than in the past.<sup>25</sup> In addition, a recent decision of the Eighth Circuit Court of Appeals addressing the issue of the Constitutionality of rules barring citation to unpublished decisions bears mention, although the focus of this Report and the bases for the proposed Recommendation involve practical concerns and general issues of the operation of appellate courts and their decision-making rather than the Constitutional grounds raised by the Eighth Circuit.

Constitutional Analysis of *Anastasoff v. U.S.*

A panel of the Eighth Circuit Court of Appeals recently added a new wrinkle to the debate over unpublished opinions in the case *Anastasoff v. United States*.<sup>26</sup> On August 22, 2000, Judge Richard S. Arnold, writing for the court, held that the Eighth Circuit's rule restricting citation to unpublished opinions violated Article III of the Constitution. In affirming the district court's denial of Ms. Anastasoff's claim for a tax refund, the panel relied on an unpublished Eighth Circuit case, *Christie v. United States*. *Christie* was directly on point and squarely addressed the issue before the court.

Ms. Anastasoff argued that the panel was not bound by the decision in *Christie* because, per the Eighth Circuit's own rule, it was unpublished.<sup>27</sup> Rather than follow the rule, Judge Arnold noted that the Framers of the Constitution considered the federal courts to have

<sup>24</sup> Standards for Publication, supra note 19, at 18; Stienstra, supra note 8, at 3 (noting that the U.S. Attorney is a frequent litigant who might benefit if citation to unpublished opinions is allowed); Reynolds and Richman I, supra note 8, at 1179; Lauren K. Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals, 87 Mich. L. Rev. 940, 958-59 (1989).

<sup>25</sup> See, e.g., Charles E. Carpenter, Jr., The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy? 50 S.C. L. Rev. 235 (1998); Shuldberg, supra note 12.

<sup>26</sup> 223 F.3d 989 (8<sup>th</sup> Cir. 2000).

<sup>27</sup> See 8<sup>th</sup> Cir. R. 28A(i).

DRAFT – March 30, 2001

certain powers, which the Framers delegated to the courts and limited by virtue of Article III. Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. Therefore, the Framers considered that every judicial decision is authoritative to the extent necessary for the decision and must be applied in subsequent cases to similarly situated parties. Because all judicial decisions result in the creation of precedent, and Article III implicitly formalizes the doctrine of precedent, the federal courts do not have the power to decide which of their opinions create precedent. Thus, the rules purporting to restrict the creation of precedent are unconstitutional.

Judge Arnold was careful to point out that the panel's decision in *Anastasoff* does not impact the federal courts' ability to designate certain opinions as not for publication. Judge Arnold's point was that, regardless of the fact that nonpublication of decisions may have practical value in terms of saving space and time, the federal courts do not have the discretion to limit the doctrine of precedent implicit in Article III.

Ms. Anastasoff filed a petition for rehearing *en banc* before the Eighth Circuit.<sup>28</sup> Before the *en banc* panel could issue a decision, the United States mooted the case by paying Anastasoff the entire amount of her claimed refund. Consequently, on December 18, 2000, the *en banc* panel vacated Judge Arnold's opinion and remanded to the District Court with directions to vacate its judgment as moot.<sup>29</sup>

### Practical Litigation Concerns

Several practical litigation considerations can be advanced to support a departure from rules limiting or forbidding citation to unpublished decisions.

First, and perhaps foremost, is the issue of the quality and extent of the record upon which to base a further appeal. Rules barring citation to unpublished decisions prevent a party from creating a complete record of the authorities and prior appellate rulings bearing on a matter.<sup>30</sup>

Second, by restricting the effect and use of such decisions, rules against citation of unpublished decisions also impact the appellate court's ability to provide a complete and instructive record of the court's analysis and rationale for its decision, likewise impacting future proceedings. This impact can be felt both in terms of a court's inability to support its decision by

<sup>28</sup> See Steve France, Analysis & Perspective, 69 U.S. Law Week 2227 (BNA, Oct. 24, 2000).

<sup>29</sup> United States v. Anastasoff, 235 F.3d 1054 (8<sup>th</sup> Cir. 2000).

<sup>30</sup> Carpenter, *supra* note 25, at 247-48.

DRAFT – March 30, 2001

1 reference to prior (but unpublished) decisions, and in its inability to cite or rely upon such  
2 decisions in distinguishing the outcome of another case.<sup>31</sup>

3  
4 Third, rules against citing unpublished decisions may create anomalous situations  
5 in which the prior (but unpublished) decisions of a particular court of appeals are given less  
6 weight (or perhaps no weight at all) than (published) decisions of other appellate courts. Both  
7 litigants and appellate courts likely would agree that the expectations of the parties and the  
8 federal appellate system would be better served where a court's own body of prior decision-  
9 making is given proper credence and effect vis-a-vis the decisions of a sister court.<sup>32</sup>

10  
11 Fourth, the lack of uniformity among the rules and approaches of the various  
12 federal appeals courts also is problematic. The same unpublished opinion may be citable for its  
13 persuasive value in one circuit court, but not citable in another. This difference in approach is  
14 particularly vexing because it could result in situations where an unpublished opinion could be  
15 cited to sister courts, but not to the court authoring the opinion.

#### 16 17 Fairness/Access Issues

18  
19 The fairness and access concerns that historically have been raised to justify rules  
20 against citation to unpublished decisions appear to be obviated, if not eliminated, by the advances  
21 and expansions in electronic publication and other mass dissemination of unpublished decisions.

22  
23  
24 The unpublished decisions of most federal appellate courts, at least those rendered  
25 in the last ten years, are effectively "published" and accessible either via (1) electronic legal  
26 research services such as LEXIS and WESTLAW, (2) internet websites operated by the appellate  
27 courts themselves, or (3) a combination of both. Additionally, numerous specialized case  
28 reporters have sprung up in recent years, reporting on and reprinting published and unpublished  
29 cases alike on particular areas of law and practice. Given the widespread use of and general  
30 access to these electronic and specialty reporting media, concerns about litigants' inability to  
31 identify and collect relevant unpublished decisions should be minimized. Moreover, the extent  
32 to which unpublished decisions are made available through such media, as well as the  
33 accessibility of such media, are likely to increase and improve in the years ahead.<sup>33</sup>

34  
35 Recently, the Committee on Federal Courts issued a report in which a majority of  
36 the members of the Committee recommended that the Second Circuit adopt a rule allowing

<sup>31</sup> Shuldberg, supra note 9, at 561-62; Robel, supra note 32, at 960.

<sup>32</sup> Carpenter, supra note 25, at 258.

<sup>33</sup> Shuldberg, supra note 9, at 559-60.



DRAFT – March 30, 2001

1 citation to unpublished summary orders in cases where counsel believes that the summary orders  
2 have substantial persuasive value beyond any published decision.<sup>34</sup> The Committee found that  
3 the two rationales commonly advanced to prohibit citation to unpublished decisions – unfair  
4 access to unpublished opinions and judicial efficiency – were not persuasive to support a total  
5 ban on citation.<sup>35</sup> With respect to the first rationale, the Committee noted that the Second  
6 Circuit's unpublished summary orders are widely available on LEXIS, WESTLAW or the court's  
7 website, to which many lawyers now have access. Summary orders are no more difficult to find  
8 than many other types of authority which parties can cite, such as slip opinions, state court  
9 reporters, BNA reports, and the like.<sup>36</sup>

10  
11 Further, there are strong countervailing "fairness" arguments that militate in favor  
12 of allowing citation to unpublished opinions. First, significant concerns about fairness are raised  
13 when a litigant is prohibited from calling to a court's attention a prior ruling of that court that  
14 may be relevant to the case at hand. Second, fairness issues also are presented when courts may  
15 have adopted guiding approaches and principles to particular legal issues that are embodied  
16 solely in unpublished opinions that, if not citable, are less likely to be known by litigants. Third,  
17 the "unequal access" concern voiced by advocates of no-citation rules for unpublished opinions  
18 is not eliminated by such rules, only disguised. Litigants better able to access unpublished  
19 opinions will be able to do so whether such opinions are citable or not. No-citation rules serve  
20 only to mask a litigant's reliance on the analysis or reasoning of such unpublished opinions,  
21 while still leaving the other party uninformed about the existence of the unpublished decision and  
22 other related unpublished opinions.

#### 23 24 Quality of Decision-Making and Judicial Accountability

25  
26 Another consideration is the effect of rules barring citation to unpublished  
27 decisions on quality of judicial decision-making and accountability. Even the best-intentioned  
28 court may be inclined to give less fulsome consideration to a case, at least at the opinion-writing  
29 stage, if the court knows that its decision can or will be designated as "not for publication" and  
30 therefore will not be citable.

31  
32 Moreover, the quality of appellate decision-making may be adversely impacted by  
33 virtue of the fact that courts are depriving themselves of a universe of prior analysis, reasoning

<sup>34</sup> Report of the Committee on Federal Courts on the Second Circuit's Rule Regarding Citation of Summary Orders (July 17, 1998) ("Committee on Federal Courts Report").

<sup>35</sup> *Id.* A minority of the Committee members dissented from the Committee's recommendation on the grounds of unequal access and concern that judges would abandon summary orders if they knew that parties could cite to them.

<sup>36</sup> *Id.*

DRAFT – March 30, 2001

and decision-making embodied in unpublished opinions. Regardless of the *precedential* effect of unpublished decisions, there appears to be no principled basis for refusing to consider unpublished opinions for their possible persuasive or instructive value.

#### Use of Public Forum for Private Dispute Resolution

As public institutions, appellate courts serve important public interests. One of those interests is to develop a body of law that resolves legal issues and guides future litigants, actual and potential. Rules that permit the issuance of “not for publication” decisions that cannot be used even for their persuasive value foster the notion of courts as private dispute resolution bodies, addressing cases for the sole benefit of the involved parties but not for the benefit of the public or legal community at large.

Moreover, the supposed efficiencies and cost savings of rules limiting the use and effect of unpublished opinions actually may have the opposite effect. By depriving litigants and courts of the use of such decisions as precedent or for persuasion, disputes or issues that may easily have been disposed of by reference to such decisions instead may linger or advance. In addition, the potential deterrent value of a prior adverse appellate decision is, for practical purposes, eliminated when the decision cannot be cited because it was not published.<sup>37</sup>

Finally, although concerns have been expressed about institutional litigants having better access to or familiarity with unpublished opinions favorable to their cause, there is a countervailing problem involving such litigants and unpublished opinions. Specifically, there is a risk that specifically, institutional litigants will be successful in “burying” adverse decisions by urging that they be designated as “not for publication.” Simply stated, institutional litigants have a greater inherent incentive to manipulate the publication decision if that decision will render an unfavorable opinion uncitable by future adversaries.

#### 4. Technology Considerations and Impacts on Citation to Unpublished Decisions

<sup>37</sup> See Committee on Federal Courts Report, in which the Committee noted that:

The pervasive use of summary orders has created a vast body of unpublished decisions which are often pertinent to issues arising before the Court, but which cannot be brought to the Court's attention under the current rule. . . . The inability under the current rule to bring a highly pertinent summary order to the attention of the Court leads to unnecessary briefing and argument by the parties and wastes judicial time and effort. It is also odd to have a body of decisional law that cannot be cited yet may be recalled by judges who participated in creating it or may be found by law clerks doing research. Perhaps most significantly, the current rule risks the possibility that two identical cases could be decided inconsistently, in violation of the Courts' most basic obligation to treat like cases the same.

DRAFT – March 30, 2001

1 Due to advances in technology from the time the rules restricting citation were  
2 formulated, it is no longer as difficult to track down and utilize unpublished case law. Now, the  
3 unpublished opinions of most of the federal circuits are available electronically in one form or  
4 another. Most of the circuits have submitted the full text of their unpublished opinions to either  
5 LEXIS or WESTLAW since the late 1980's or early 1990's.<sup>38</sup> In addition, the First, Second,  
6 Eighth and Tenth Circuits put their unpublished opinions and orders on-line on the courts'  
7 websites. Further, many specialized reporters gather unpublished opinions that are of interest to  
8 their particular area of law, and these reporters often are available on-line or can be purchased on  
9 CD-ROMs.

10  
11 With the increasing use of electronic means of collecting, storing and researching  
12 legal opinions, the fears of prohibitive costs and unequal access should be minimized. Computers  
13 and CD-ROMs take up much less space than printed case reporters, with considerable savings in  
14 the cost of storage space and purchasing expensive books.<sup>39</sup> Although computer research is not  
15 without pitfalls, overall it allows a researcher to work more quickly and efficiently, particularly  
16 as new generations of attorneys now are wholly computer-literate.<sup>40</sup>

17  
18 However, as noted above, not all federal circuits make their unpublished opinions  
19 available in electronic form. This inconsistency could result in significant gaps in legal research  
20 and cause researchers to overlook opinions that directly impact their issue. Because the use of  
21 decisions in electronic format is so widespread, it is recommended that all the federal circuits  
22 take all necessary steps to make their unpublished decisions available through print or electronic  
23 publications, publicly accessible media sites, CD-ROMs, and/or Internet websites.

24  
25 Ronald Jay Cohen, Chair, Section of Litigation

26  
27 August 2001  
28  
29  
30  
31  
32  
33  
34  
35

<sup>38</sup> Exceptions are the Third Circuit, the Fifth Circuit and the Eleventh Circuit, which do not make their unpublished opinions available electronically.

<sup>39</sup> Shuldborg, *supra* note 9, at 558.

<sup>40</sup> *Id.* at 559.

DRAFT – March 30, 2001

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44

**GENERAL INFORMATION FORM**

To Be Appended to Reports with Recommendations  
(Please refer to Instructions for completing this form.)

Submitting Entity: Section of Litigation

Submitted By: Ronald J. Cohen, Chair, Section of Litigation

1. **Summary of Recommendation(s).**

The Section of Litigation and its co-sponsors, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division, recommend that the Association adopt policy urging federal courts of appeals to make their unpublished decisions more widely available through various print or electronic means, and to permit citation to relevant unpublished opinions.

2. **Approval by Submitting Entity.**

The report with recommendation on unpublished opinions was unanimously approved by the Council of the Section of Litigation on January 4, 2001.

115

DRAFT – March 30, 2001

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The "Standards Relating to Appellate Courts," approved by the House of Delegates in February 1977 and amended by the House of Delegates in August 1994 state:

Opinions of an appellate court should be a matter of public record . . . .

"Publication of Opinions," § 3.37(a). This policy would be reinforced by the recommendation with specific reference to unpublished opinions.

The "Standards Relating to Appellate Courts" also state:

Rules of court should provide that an opinion which is not formally published may not be cited, but may be used to establish *res judicata*[,] collateral estoppel, law of the case, or other similar purposes.

"Citation of Opinions Not Formally Published," § 3.37(c). The accompanying commentary further states that:

Allowing citation of unpublished opinions creates pressures to make such opinions generally available, resulting in a secondary system of unofficial publication which to some extent frustrates the purpose of the nonpublication rule.

Thus, adoption of the Recommendation will require reconsideration of this existing policy.

5. What urgency exists with requires action at this meeting of the House?

Access to, and fair use of, unpublished opinions is an important matter in the overall administration of justice in the federal courts, and thus requires prompt attention.

6. Status of Legislation. (If applicable.)

Not applicable.

115

DRAFT – March 30, 2001

- 1  
2 7. Cost to the Association. (Both direct and indirect costs.)  
3  
4 None.  
5  
6 8. Disclosure of Interest. (If applicable.)  
7  
8 Not applicable.  
9  
10 9. Referrals.  
11  
12 On April 6, 2001 the Report and Recommendation to the House of Delegates on the  
13 Use and Effect of Unpublished Opinions in the Federal Courts of Appeals was circulated  
14 for public comment to the State Delegates, House of Delegates; all ABA Standing  
15 Committees; and all ABA Sections and other entities.  
16  
17 In May 2001, the Criminal Justice Section, the Tort & Insurance Practice Section, and  
18 the Senior Lawyers Division agreed to co-sponsor the Report and Recommendation on  
19 the Use and Effect of Unpublished Opinions.  
20  
21 10. Contact Person. (Prior to the meeting.)  
22  
23 John D. Shugrue Judith A. Miller Rudy A. Englund  
24 Zevnik, Horton, Palmer Williams & Connolly LLP Lane, Powell, Spears,  
25 77 W. Wacker Drive, Ste. 3300 725 Twelfth Street, NW Lubersky LLP  
26 Chicago, IL 60601 Washington, DC 20005 1420 Fifth Ave., Ste.  
27 4100  
28 (312) 977-2500 – Tel (202) 434-5148 – Tel Seattle, WA 98101  
29 (312) 977-2560 – Fax (202) 434-5246 – Fax (206) 223-7042 – Tel  
30 jds@ch.zhgm.com jmiller@wc.com (206) 223-7107 – Fax  
31  
32 englundr@lanepowell.com  
33  
34 11. Contact Person. (Who will present the report to the House.)  
35  
36 David C. Weiner  
37 Hahn, Loeser & Parks  
38 3300 BP Tower  
39 200 Public Square  
40 Cleveland, OH 44114  
41 (216) 274-2255 – Tel  
42 (216) 241-2824 – Fax  
43 doweiner@hahnlaw.com  
44  
45  
46

115

DRAFT – March 30, 2001

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42

**EXECUTIVE SUMMARY OF THE  
REPORT AND RECOMMENDATION**

**A. Summary of the Recommendation**

The Section of Litigation and its co-sponsors, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division, recommend that the Association should support a recommendation that all federal appellate courts should (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and (2) permit citation to relevant unpublished opinions.

**B. Summary of the Issue**

As the number of cases heard and decided by federal appellate courts increased, without a concomitant increase in staffing, funding, or judicial resources, the courts adopted rules concerning the publication and non-publication of their decisions, and set parameters concerning the use and effect of citation to unpublished decisions. A slim majority of federal appellate courts has adopted the rule that decisions not designated for publication not only do not constitute binding precedent, but cannot even be cited for their possible persuasive value. The issue is whether the traditional justifications for this rule are still valid or whether sound litigation reasons exist for allowing citation to unpublished opinions.

115

DRAFT – March 30, 2001

1 The Report makes the above recommendations because the traditional  
2 justifications for the current rules prohibiting citation to unpublished federal appellate court  
3 opinions – the increased cost and time to obtain, store and research a growing body of case law,  
4 the need for judicial efficiency, and the perceived unfairness to some litigants over access to  
5 unpublished opinions – no longer carry substantial weight. Several practical litigation  
6 considerations exist to support a departure from the current rules.

7  
8 First, and perhaps foremost, is the issue of the quality and extent of  
9 the record upon which to base a further appeal. Rules barring  
10 citation to unpublished decisions prevent a party from creating a  
11 complete record of the authorities and prior appellate rulings  
12 bearing on a matter.

13  
14 Second, by restricting the effect and use of such decisions, rules  
15 against citation of unpublished decisions also impact the appellate  
16 court's ability to provide a complete and instructive record of the  
17 court's analysis and rationale for its decision, likewise impacting  
18 future proceedings. This impact can be felt both in terms of a  
19 court's inability to support its decision by reference to prior (but  
20 unpublished) decisions, and in its inability to cite or rely upon such  
21 decisions in distinguishing the outcome of another case.

22  
23 Third, rules against citing unpublished decisions may create  
24 anomalous situations in which the prior (but unpublished)  
25 decisions of a particular court of appeals are given less weight (or  
26 perhaps no weight at all) than (published) decisions of other  
27 appellate courts. Both litigants and appellate courts likely would  
28 agree that the expectations of the parties and the federal appellate  
29 system would be better served where a court's own body of prior  
30 decision-making is given proper credence and effect vis-a-vis the  
31 decisions of a sister court.

32  
33 Fourth, the lack of uniformity among the rules and approaches of  
34 the various federal appeals courts also is problematic. The same  
35 unpublished opinion may be citable for its persuasive value in one  
36 circuit court, but not citable in another. This difference in  
37 approach is particularly vexing because it could result in situations  
38 where an unpublished opinion could be cited to sister courts, but  
39 not to the court authoring the opinion.

40  
41 The fairness and access concerns that historically have been raised to justify rules  
42 against citation to unpublished decisions have been diminished by the advances and expansions

115



DRAFT – March 30, 2001

1 in electronic publication and other mass dissemination of unpublished decisions. The  
2 unpublished opinions of most of the federal circuits are available electronically, either on LEXIS,  
3 WESTLAW, CD-ROM, court websites, or in specialized reporters. Overall, access to these  
4 unofficial reporting media has increased, while the cost of collecting, storing and researching has  
5 decreased.

6  
7 C. Impact of the Policy Recommendation  
8

9 Allowing citation to unpublished opinions will help to ensure that judges will give  
10 full consideration to their decisions in all cases, by encouraging more complete analysis in  
11 unpublished opinions as well as allowing parties to make the courts aware of the complete body  
12 of case law that may affect their particular case. In contrast, depriving litigants and courts of the  
13 use of such decisions as precedent or for persuasion may cause disputes or issues that may easily  
14 have been disposed of by reference to such decisions instead to linger or advance. In addition,  
15 the potential deterrent value of a prior adverse appellate decision is, for practical purposes,  
16 eliminated when the decision cannot be cited because it was not published. Finally, citation to  
17 unpublished opinions will deter institutional litigants from attempting to influence the  
18 publication decision to eliminate the effect of unfavorable opinions against them. Thus, citation  
19 to unpublished opinions will benefit judges and litigants alike.  
20

21  
22 D. Opposing Views  
23

24 There are two traditional justifications for preventing citation to unpublished  
25 opinions. First, it is argued that unfettered citation to unpublished opinions would substantially  
26 undermine the purposes of selective publication – reduction of costs and increased judicial  
27 efficiency. Second, there is a concern that allowing citation to unpublished decisions is unfair  
28 because certain litigants would have more access to the body of unpublished opinions than  
29 others. The Report discusses these justifications and concludes that they are no longer valid in  
30 the modern legal profession.  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42

**AMERICAN BAR ASSOCIATION**  
**SECTION OF LITIGATION**  
**CRIMINAL JUSTICE SECTION**  
**TORT AND INSURANCE PRACTICE SECTION**  
**SENIOR LAWYERS DIVISION**  
**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1       **RESOLVED THAT** the American Bar Association opposes the practice of various  
2 federal courts of appeal in prohibiting citation to or reliance upon their unpublished opinions  
3 as contrary to the best interests of the public and the legal profession.  
4

5       **FURTHER RESOLVED THAT** the American Bar Association urges the federal courts of  
6 appeals uniformly to:  
7

- 8           1)     Take all necessary steps to make their unpublished decisions available through  
9                   print or electronic publications, publicly accessible media sites, CD-ROMs,  
10                  and/or Internet Websites; and  
11  
12          2)     Permit citation to relevant unpublished opinions.  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33

DRAFT – March 30, 2001

**REPORT ON RECOMMENDATION FOR PUBLICATION AND RELIANCE UPON  
UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS**

As the number of cases heard and decided by federal appellate courts increased, without a concomitant increase in staffing, funding, or judicial resources, the courts adopted rules concerning the publication and non-publication of their decisions, and set parameters concerning the use and effect of and citation to unpublished decisions. Generally speaking, the approach favored by the federal courts of appeals has been to give the courts discretion in deciding which cases to publish in official case reporters, and which cases not to publish. The appellate courts also have discretion to determine whether, to what extent, and for what purposes their unpublished decisions may be cited. A slim majority of federal appellate courts has adopted a companion principle, which is that decisions not designated for publication not only do not constitute binding precedent, but cannot even be cited for their possible persuasive value.

This Report provides an overview and summary of federal courts of appeals rules concerning litigants' ability (or inability) to cite unpublished opinions and the effect, if any, to be given by the courts to such unpublished decisions. The Report examines the historic rationale for such rules and addresses the continued vitality of these rationales. The Report concludes that the justifications for rules prohibiting citation to unpublished federal appellate decisions no longer carry substantial weight, and that the ABA should support a recommendation that all federal appellate courts (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet websites; and (2) permit citation to relevant unpublished opinions.<sup>1</sup>

**1. Overview of Federal Appellate Court Rules Concerning Citations to  
Unpublished Decisions or Orders**

All of the federal courts of appeals have rules governing citation to unpublished decisions or orders. These rules fall into two general categories.

The first category consists of rules that prohibit the citation to unpublished decisions except for purposes of establishing the doctrines of the law of the case, *res judicata* or collateral estoppel. The Federal, District of Columbia, First, Second, Seventh, Eighth and Ninth Circuits, as well as the Federal Court of Claims, have such rules.<sup>2</sup>

<sup>1</sup> The Report and Recommendation do not address the threshold issue of publication of appellate decisions or the criteria employed by courts in making decisions concerning publication.

<sup>2</sup> See Fed. Cir. R. 47.6(b); D.C. Cir. R. 28(c); 1<sup>st</sup> Cir. R. 36(2)(F); 2d Cir. R. 0.23; 7<sup>th</sup> Cir. R. 53(b)(2)(iv); 8<sup>th</sup> Cir. R. 28A(i); 9<sup>th</sup> Cir. R. 36-3; Fed. Ct. Cl. R. 52.1. But see discussion *infra* at 3.A. concerning the Eighth Circuit's recent decision concerning the constitutionality of its rule.

DRAFT – March 30, 2001

The Court of Appeals for the District of Columbia goes further in prohibiting citation not only to the court's own unpublished decisions, but to unpublished decisions from other courts as well, unless the particular court considers its unpublished decisions to be precedential.<sup>3</sup>

The second category consists of rules that disfavor the citation to unpublished decisions, but allow citation if counsel believes that the decision has precedential value in relation to a material issue in a case and if there is no published opinion that would serve as well. The rules require that counsel must provide a copy of the unpublished opinion to the court. The Fourth, Fifth, Sixth, Tenth and Eleventh Circuits take this approach.<sup>4</sup>

Finally, the Third Circuit simply states that it will itself not cite to any of its unpublished opinions because they are not precedent.<sup>5</sup> However, the Third Circuit does not place any restrictions on the ability of parties to cite to unpublished decisions.<sup>6</sup>

In addition to the federal court rules, the American Bar Association's Standing Committee on Ethics states that it is:

ethically improper for a lawyer to cite to a court an unpublished opinion . . . where the forum court has a specific rule prohibiting any reference in briefs to an opinion . . . marked . . . 'not for publication.'

## 2. Origins of and Rationale for Rules Restricting Effect of and Citation to Unpublished Decisions or Orders

<sup>3</sup> See D.C. Cir. R. 28(c).

<sup>4</sup> See 4<sup>th</sup> Cir. R. 36(e); 5<sup>th</sup> Cir. R. 47.5; 6<sup>th</sup> Cir. R. 24(c); 10<sup>th</sup> Cir. R. 36.3; 11<sup>th</sup> Cir. R. 36-2; see also Report of the Committee on Federal Courts on the Second Circuit's Rule Regarding Citation of Summary Orders (July 17, 1998), discussed *infra* at 3.C, in which the Committee on Federal Courts recommends that the Second Circuit adopt a rule governing citation to unpublished summary orders similar to the rules in the Fourth, Sixth and Tenth Circuits.

<sup>5</sup> 3d Cir. IOP 5.8.

<sup>6</sup> See 3d Cir. R. 28.3 ("Citations to federal decisions that have not been formally reported shall identify the court, docket number and date, and refer to the electronically transmitted decision.").

<sup>7</sup> ABA Formal Op. 94-386R.

DRAFT – March 30, 2001

1           The origin of rules restricting citation to unpublished decisions is linked to the  
2 determination that certain opinions should not be published.<sup>8</sup> Up to and through the 1960's and  
3 1970's, the vast majority of decisions from federal courts, even one-word Memorandum  
4 Decisions, routinely were published.<sup>9</sup> However, that same period experienced a significant  
5 increase in the number of opinions being handed down by the federal courts.<sup>10</sup> In 1964 the  
6 Judicial Conference of the United States expressed concern over the number of published  
7 opinions that might impose unreasonable costs and practical difficulties in maintaining access to  
8 the published reports.<sup>11</sup> Thus, the Judicial Conference recommended that the federal courts of  
9 appeals publish "only those opinions which are of general precedential value."<sup>12</sup> In 1971 the  
10 Federal Judicial Center issued a report which further highlighted the problems faced by the  
11 federal courts due to the increasing caseload.<sup>13</sup> In 1972, the Judicial Conference directed the  
12 federal circuits to develop plans to limit the publication of opinions, which eventually resulted in  
13 the current rules in the federal courts.<sup>14</sup>

14  
15           The concern over the number of opinions generally is expressed in two ways.  
16 First, as the amount of decisions increases, so too does the cost of publishing, disseminating and  
17 researching them.<sup>15</sup> There was a fear that the increased costs will be passed on to the consumer  
18 of legal services, resulting in inequities as only those who can afford to pay these high costs will  
19 obtain the best legal advice.<sup>16</sup>

<sup>8</sup> For an in-depth discussion of the history and rationale for unpublished opinions, see Donna Stienstra, Federal Judicial Center, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (1985); William L. Reynolds and William M. Richman, The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978) ("Reynolds and Richman I"); William L. Reynolds and William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U.Chi. L. Rev. 573 (1981) ("Reynolds and Richman II").

<sup>9</sup> Kirt Shuldberg, Digital Influence: Technology and Unpublished Opinions in the federal courts of appeals, 85 Calif. L. Rev. 541, 546 (1997); Donald R. Songer, Criteria for Publication in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 308 (1990) ("It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small.").

<sup>10</sup> Hon. Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 Ohio St. L.J. 177, 181-85 (1999).

<sup>11</sup> Report of the Proceedings of the Judicial Conference of the United States 11 (1964).

<sup>12</sup> *Id.*

<sup>13</sup> William L. Reynolds and William M. Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L.J. 806, 808 (1979).

<sup>14</sup> Report of the Proceedings of the Judicial Conference of the United States 33 (1972).

<sup>15</sup> Shuldberg, *supra* note 9, at 547-48.

<sup>16</sup> Reynolds and Richman I, *supra* note 8, at 1188-89.

DRAFT – March 30, 2001

1  
2 As the number of federal cases grew, federal judges and their clerks indicated that  
3 they were unable to keep up with and resolve their caseloads in a timely manner. Thus, a second  
4 concern was that the efficiency of the federal court system would be compromised by the need to  
5 publish every single decision, no matter how unimportant.<sup>17</sup> By selectively publishing opinions,  
6 judges could spend less time writing opinions and more time resolving a larger number of  
7 cases.<sup>18</sup> Moreover, in the interests of judicial efficiency, courts should spend more time on  
8 published opinions that substantially advance the state of the law, and not publish opinions that  
9 only resolve a dispute between litigants.<sup>19</sup>

10  
11 Having made the determination not to publish certain decisions, it quickly was  
12 decided that citation to these decisions should be restricted. It was argued that unfettered citation  
13 to unpublished decisions would substantially undermine the purposes of selective publication –  
14 reduction of costs and increased judicial efficiency.<sup>20</sup> If litigants could cite to unpublished  
15 decisions, the parties and the court still would have to spend time researching these cases.<sup>21</sup>  
16 Alternate collections of these decisions would develop and practitioners and law libraries would  
17 have to invest funds to keep abreast of these collections. Judicial efficiency also would suffer.  
18 the argument went, because judges would feel compelled to spend more time writing opinions  
19 that they know were going to be cited anyway.<sup>22</sup>

20  
21 In addition, there was a concern that allowing citation to unpublished decisions  
22 was unfair because certain litigants would have more access to the body of unpublished opinions  
23 than others.<sup>23</sup> For example, attorneys with greater time and resources would more easily be able  
24 to bear the costs of researching and maintaining collections of the decisions, and frequent  
25 litigants, such as the government, would have access to a greater number of unpublished opinions

---

<sup>17</sup> Shuldberg, *supra* note 9, at 548; Martin, *supra* note 10, at 190; Joiner, Limiting Publication of Judicial Opinions, 56 *Judicature* 195, 196 (1972).

<sup>18</sup> Martin, *supra* note 10, at 190; George M. Weaver, The Precedential Value of Unpublished Judicial Opinions, 39 *Mercer L. Rev.* 477, 479 (1986).

<sup>19</sup> Richard A. Posner, The Federal Courts: Crisis and Reform, 124 (1985); Comm. on the Use of Appellate Court Energies, Advisory Council for Appellate Justice, FJC Research Series No. 73-2, Standards for Publication of Judicial Opinions 5 (1973).

<sup>20</sup> Reynolds and Richman I, *supra* note 8, at 1186-87.

<sup>21</sup> Shuldberg, *supra* note 9, at 550; Martin, *supra* note 10, at 190.

<sup>22</sup> Shuldberg, *supra* note 9, at 550.

<sup>23</sup> *Id.*

DRAFT – March 30, 2001

issued in the numerous cases in which they are involved.<sup>24</sup> The argument was that citation to unpublished decisions should be restricted so that these attorneys and litigants did not have an unfair advantage over smaller or less well-funded parties.

3. Bases for Recommending Changes to Rules Restricting Effect of  
and Citation to Unpublished Decisions

Many of the stated justifications for rules limiting or prohibiting citation of unpublished decisions deserve renewed scrutiny today, especially in view of technological developments that have made the availability and accessibility of unpublished decisions more widespread and easier than in the past.<sup>25</sup> In addition, a recent decision of the Eighth Circuit Court of Appeals addressing the issue of the Constitutionality of rules barring citation to unpublished decisions bears mention, although the focus of this Report and the bases for the proposed Recommendation involve practical concerns and general issues of the operation of appellate courts and their decision-making rather than the Constitutional grounds raised by the Eighth Circuit.

Constitutional Analysis of *Anastasoff v. U.S.*

A panel of the Eighth Circuit Court of Appeals recently added a new wrinkle to the debate over unpublished opinions in the case *Anastasoff v. United States*.<sup>26</sup> On August 22, 2000, Judge Richard S. Arnold, writing for the court, held that the Eighth Circuit's rule restricting citation to unpublished opinions violated Article III of the Constitution. In affirming the district court's denial of Ms. Anastasoff's claim for a tax refund, the panel relied on an unpublished Eighth Circuit case, *Christie v. United States*. *Christie* was directly on point and squarely addressed the issue before the court.

Ms. Anastasoff argued that the panel was not bound by the decision in *Christie* because, per the Eighth Circuit's own rule, it was unpublished.<sup>27</sup> Rather than follow the rule, Judge Arnold noted that the Framers of the Constitution considered the federal courts to have

<sup>24</sup> Standards for Publication, supra note 19, at 18; Stierstra, supra note 8, at 3 (noting that the U.S. Attorney is a frequent litigant who might benefit if citation to unpublished opinions is allowed); Reynolds and Richman I, supra note 8, at 1172; Lauren K. Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals, 87 Mich. L. Rev. 940, 958-59 (1989).

<sup>25</sup> See, e.g., Charles E. Carpenter, Jr., The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy? 50 S.C. L. Rev. 235 (1998); Shuldberg, supra note 12.

<sup>26</sup> 223 F.3d 989 (8<sup>th</sup> Cir. 2000).

<sup>27</sup> See 8<sup>th</sup> Cir. R. 28A(i).

DRAFT – March 30, 2001

certain powers, which the Framers delegated to the courts and limited by virtue of Article III. Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. Therefore, the Framers considered that every judicial decision is authoritative to the extent necessary for the decision and must be applied in subsequent cases to similarly situated parties. Because all judicial decisions result in the creation of precedent, and Article III implicitly formalizes the doctrine of precedent, the federal courts do not have the power to decide which of their opinions create precedent. Thus, the rules purporting to restrict the creation of precedent are unconstitutional.

Judge Arnold was careful to point out that the panel's decision in *Anastasoff* does not impact the federal courts' ability to designate certain opinions as not for publication. Judge Arnold's point was that, regardless of the fact that nonpublication of decisions may have practical value in terms of saving space and time, the federal courts do not have the discretion to limit the doctrine of precedent implicit in Article III.

Ms. Anastasoff filed a petition for rehearing *en banc* before the Eighth Circuit.<sup>28</sup> Before the *en banc* panel could issue a decision, the United States mooted the case by paying Anastasoff the entire amount of her claimed refund. Consequently, on December 18, 2000, the *en banc* panel vacated Judge Arnold's opinion and remanded to the District Court with directions to vacate its judgment as moot.<sup>29</sup>

#### Practical Litigation Concerns

Several practical litigation considerations can be advanced to support a departure from rules limiting or forbidding citation to unpublished decisions.

First, and perhaps foremost, is the issue of the quality and extent of the record upon which to base a further appeal. Rules barring citation to unpublished decisions prevent a party from creating a complete record of the authorities and prior appellate rulings bearing on a matter.<sup>30</sup>

Second, by restricting the effect and use of such decisions, rules against citation of unpublished decisions also impact the appellate court's ability to provide a complete and instructive record of the court's analysis and rationale for its decision, likewise impacting future proceedings. This impact can be felt both in terms of a court's inability to support its decision by

<sup>28</sup> See Steve France, Analysis & Perspective, 69 U.S. Law Week 2227 (BNA, Oct. 24, 2000).

<sup>29</sup> United States v. Anastasoff, 235 F.3d 1054 (8<sup>th</sup> Cir. 2000).

<sup>30</sup> Carpenter, *supra* note 25, at 247-48.



DRAFT – March 30, 2001

1 reference to prior (but unpublished) decisions, and in its inability to cite or rely upon such  
2 decisions in distinguishing the outcome of another case.<sup>31</sup>

3  
4 Third, rules against citing unpublished decisions may create anomalous situations  
5 in which the prior (but unpublished) decisions of a particular court of appeals are given less  
6 weight (or perhaps no weight at all) than (published) decisions of other appellate courts. Both  
7 litigants and appellate courts likely would agree that the expectations of the parties and the  
8 federal appellate system would be better served where a court's own body of prior decision-  
9 making is given proper credence and effect vis-a-vis the decisions of a sister court.<sup>32</sup>

10  
11 Fourth, the lack of uniformity among the rules and approaches of the various  
12 federal appeals courts also is problematic. The same unpublished opinion may be citable for its  
13 persuasive value in one circuit court, but not citable in another. This difference in approach is  
14 particularly vexing because it could result in situations where an unpublished opinion could be  
15 cited to sister courts, but not to the court authoring the opinion.

#### 16 17 Fairness/Access Issues

18  
19 The fairness and access concerns that historically have been raised to justify rules  
20 against citation to unpublished decisions appear to be obviated, if not eliminated, by the advances  
21 and expansions in electronic publication and other mass dissemination of unpublished decisions.

22  
23  
24 The unpublished decisions of most federal appellate courts, at least those rendered  
25 in the last ten years, are effectively "published" and accessible either via (1) electronic legal  
26 research services such as LEXIS and WESTLAW, (2) internet websites operated by the appellate  
27 courts themselves, or (3) a combination of both. Additionally, numerous specialized case  
28 reporters have sprung up in recent years, reporting on and reprinting published and unpublished  
29 cases alike on particular areas of law and practice. Given the widespread use of and general  
30 access to these electronic and specialty reporting media, concerns about litigants' inability to  
31 identify and collect relevant unpublished decisions should be minimized. Moreover, the extent  
32 to which unpublished decisions are made available through such media, as well as the  
33 accessibility of such media, are likely to increase and improve in the years ahead.<sup>33</sup>

34  
35 Recently, the Committee on Federal Courts issued a report in which a majority of  
36 the members of the Committee recommended that the Second Circuit adopt a rule allowing

<sup>31</sup> Shuldberg, supra note 9, at 561-62; Robel, supra note 32, at 960.

<sup>32</sup> Carpenter, supra note 25, at 258.

<sup>33</sup> Shuldberg, supra note 9, at 559-60.

DRAFT – March 30, 2001

1 citation to unpublished summary orders in cases where counsel believes that the summary orders  
2 have substantial persuasive value beyond any published decision.<sup>34</sup> The Committee found that  
3 the two rationales commonly advanced to prohibit citation to unpublished decisions – unfair  
4 access to unpublished opinions and judicial efficiency – were not persuasive to support a total  
5 ban on citation.<sup>35</sup> With respect to the first rationale, the Committee noted that the Second  
6 Circuit's unpublished summary orders are widely available on LEXIS, WESTLAW or the court's  
7 website, to which many lawyers now have access. Summary orders are no more difficult to find  
8 than many other types of authority which parties can cite, such as slip opinions, state court  
9 reporters, BNA reports, and the like.<sup>36</sup>

10  
11 Further, there are strong countervailing "fairness" arguments that militate in favor  
12 of allowing citation to unpublished opinions. First, significant concerns about fairness are raised  
13 when a litigant is prohibited from calling to a court's attention a prior ruling of that court that  
14 may be relevant to the case at hand. Second, fairness issues also are presented when courts may  
15 have adopted guiding approaches and principles to particular legal issues that are embodied  
16 solely in unpublished opinions that, if not citable, are less likely to be known by litigants. Third,  
17 the "unequal access" concern voiced by advocates of no-citation rules for unpublished opinions  
18 is not eliminated by such rules, only disguised. Litigants better able to access unpublished  
19 opinions will be able to do so whether such opinions are citable or not. No-citation rules serve  
20 only to mask a litigant's reliance on the analysis or reasoning of such unpublished opinions,  
21 while still leaving the other party uninformed about the existence of the unpublished decision and  
22 other related unpublished opinions.

#### 23 24 Quality of Decision-Making and Judicial Accountability

25  
26 Another consideration is the effect of rules barring citation to unpublished  
27 decisions on quality of judicial decision-making and accountability. Even the best-intentioned  
28 court may be inclined to give less fulsome consideration to a case, at least at the opinion-writing  
29 stage, if the court knows that its decision can or will be designated as "not for publication" and  
30 therefore will not be citable.

31  
32 Moreover, the quality of appellate decision-making may be adversely impacted by  
33 virtue of the fact that courts are depriving themselves of a universe of prior analysis, reasoning

<sup>34</sup> Report of the Committee on Federal Courts on the Second Circuit's Rule Regarding Citation of Summary Orders (July 17, 1998) ("Committee on Federal Courts Report").

<sup>35</sup> *Id.* A minority of the Committee members dissented from the Committee's recommendation on the grounds of unequal access and concern that judges would abandon summary orders if they knew that parties could cite to them.

<sup>36</sup> *Id.*

DRAFT – March 30, 2001

and decision-making embodied in unpublished opinions. Regardless of the *procedential* effect of unpublished decisions, there appears to be no principled basis for refusing to consider unpublished opinions for their possible persuasive or instructive value.

#### Use of Public Forum for Private Dispute Resolution

As public institutions, appellate courts serve important public interests. One of those interests is to develop a body of law that resolves legal issues and guides future litigants, actual and potential. Rules that permit the issuance of “not for publication” decisions that cannot be used even for their persuasive value foster the notion of courts as private dispute resolution bodies, addressing cases for the sole benefit of the involved parties but not for the benefit of the public or legal community at large.

Moreover, the supposed efficiencies and cost savings of rules limiting the use and effect of unpublished opinions actually may have the opposite effect. By depriving litigants and courts of the use of such decisions as precedent or for persuasion, disputes or issues that may easily have been disposed of by reference to such decisions instead may linger or advance. In addition, the potential deterrent value of a prior adverse appellate decision is, for practical purposes, eliminated when the decision cannot be cited because it was not published.<sup>37</sup>

Finally, although concerns have been expressed about institutional litigants having better access to or familiarity with unpublished opinions favorable to their cause, there is a countervailing problem involving such litigants and unpublished opinions. Specifically, there is a risk that specifically, institutional litigants will be successful in “burying” adverse decisions by urging that they be designated as “not for publication.” Simply stated, institutional litigants have a greater inherent incentive to manipulate the publication decision if that decision will render an unfavorable opinion uncitable by future adversaries.

#### 4. Technology Considerations and Impacts on Citation to Unpublished Decisions

<sup>37</sup> See Committee on Federal Courts Report, in which the Committee noted that:

The pervasive use of summary orders has created a vast body of unpublished decisions which are often pertinent to issues arising before the Court, but which cannot be brought to the Court's attention under the current rule. . . . The inability under the current rule to bring a highly pertinent summary order to the attention of the Court leads to unnecessary briefing and argument by the parties and wastes judicial time and effort. It is also odd to have a body of decisional law that cannot be cited yet may be recalled by judges who participated in creating it or may be found by law clerks doing research. Perhaps most significantly, the current rule risks the possibility that two identical cases could be decided inconsistently, in violation of the Courts' most basic obligation to treat like cases the same.

DRAFT – March 30, 2001

1 Due to advances in technology from the time the rules restricting citation were  
2 formulated, it is no longer as difficult to track down and utilize unpublished case law. Now, the  
3 unpublished opinions of most of the federal circuits are available electronically in one form or  
4 another. Most of the circuits have submitted the full text of their unpublished opinions to either  
5 LEXIS or WESTLAW since the late 1980's or early 1990's.<sup>38</sup> In addition, the First, Second,  
6 Eighth and Tenth Circuits put their unpublished opinions and orders on-line on the courts'  
7 websites. Further, many specialized reporters gather unpublished opinions that are of interest to  
8 their particular area of law, and these reporters often are available on-line or can be purchased on  
9 CD-ROMs.

10  
11 With the increasing use of electronic means of collecting, storing and researching  
12 legal opinions, the fears of prohibitive costs and unequal access should be minimized. Computers  
13 and CD-ROMs take up much less space than printed case reporters, with considerable savings in  
14 the cost of storage space and purchasing expensive books.<sup>39</sup> Although computer research is not  
15 without pitfalls, overall it allows a researcher to work more quickly and efficiently, particularly  
16 as new generations of attorneys now are wholly computer-literate.<sup>40</sup>

17  
18 However, as noted above, not all federal circuits make their unpublished opinions  
19 available in electronic form. This inconsistency could result in significant gaps in legal research  
20 and cause researchers to overlook opinions that directly impact their issue. Because the use of  
21 decisions in electronic format is so widespread, it is recommended that all the federal circuits  
22 take all necessary steps to make their unpublished decisions available through print or electronic  
23 publications, publicly accessible media sites, CD-ROMs, and/or Internet websites.

24  
25 Ronald Jay Cohen, Chair, Section of Litigation

26  
27 August 2001  
28  
29  
30  
31  
32  
33  
34  
35

<sup>38</sup> Exceptions are the Third Circuit, the Fifth Circuit and the Eleventh Circuit, which do not make their unpublished opinions available electronically.

<sup>39</sup> Shulldberg, *supra* note 9, at 558.

<sup>40</sup> *Id.* at 559.

DRAFT – March 30, 2001

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44

**GENERAL INFORMATION FORM**

To Be Appended to Reports with Recommendations  
(Please refer to Instructions for completing this form.)

Submitting Entity: Section of Litigation

Submitted By: Ronald J. Cohen, Chair, Section of Litigation

1. **Summary of Recommendation(s).**

The Section of Litigation and its co-sponsors, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division, recommend that the Association adopt policy urging federal courts of appeals to make their unpublished decisions more widely available through various print or electronic means, and to permit citation to relevant unpublished opinions.

2. **Approval by Submitting Entity.**

The report with recommendation on unpublished opinions was unanimously approved by the Council of the Section of Litigation on January 4, 2001.

115

DRAFT – March 30, 2001

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The "Standards Relating to Appellate Courts," approved by the House of Delegates in February 1977 and amended by the House of Delegates in August 1994 state:

Opinions of an appellate court should be a matter of public record . . . .

"Publication of Opinions," § 3.37(a). This policy would be reinforced by the recommendation with specific reference to unpublished opinions.

The "Standards Relating to Appellate Courts" also state:

Rules of court should provide that an opinion which is not formally published may not be cited, but may be used to establish *res judicata*[,] collateral estoppel, law of the case, or other similar purposes.

"Citation of Opinions Not Formally Published," § 3.37(c). The accompanying commentary further states that:

Allowing citation of unpublished opinions creates pressures to make such opinions generally available, resulting in a secondary system of unofficial publication which to some extent frustrates the purpose of the nonpublication rule.

Thus, adoption of the Recommendation will require reconsideration of this existing policy.

5. What urgency exists with requires action at this meeting of the House?

Access to, and fair use of, unpublished opinions is an important matter in the overall administration of justice in the federal courts, and thus requires prompt attention.

6. Status of Legislation. (If applicable.)

Not applicable.

115

DRAFT – March 30, 2001

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

On April 6, 2001 the Report and Recommendation to the House of Delegates on the Use and Effect of Unpublished Opinions in the Federal Courts of Appeals was circulated for public comment to the State Delegates, House of Delegates; all ABA Standing Committees; and all ABA Sections and other entities.

In May 2001, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division agreed to co-sponsor the Report and Recommendation on the Use and Effect of Unpublished Opinions.

10. Contact Person. (Prior to the meeting.)

John D. Shugrue  
Zevnik, Horton, Palmer  
77 W. Wacker Drive, Ste. 3300  
Chicago, IL 60601

Judith A. Miller  
Williams & Connolly LLP  
725 Twelfth Street, NW  
Washington, DC 20005

Rudy A. Englund  
Lane, Powell, Spears,  
Lubersky LLP  
1420 Fifth Ave., Ste.

(312) 977-2500 – Tel  
(312) 977-2560 – Fax  
jds@ch.zhgm.com

(202) 434-5148 – Tel  
(202) 434-5246 – Fax  
jmiller@wc.com

Seattle, WA 98101  
(206) 223-7042 – Tel  
(206) 223-7107 – Fax

englundr@lanepowell.com

11. Contact Person. (Who will present the report to the House.)

David C. Weiner  
Hahn, Loeser & Parks  
3300 BP Tower  
200 Public Square  
Cleveland, OH 44114  
(216) 274-2255 – Tel  
(216) 241-2824 – Fax  
doweiner@hahnlaw.com

115

DRAFT – March 30, 2001

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42

**EXECUTIVE SUMMARY OF THE  
REPORT AND RECOMMENDATION**

**A. Summary of the Recommendation**

The Section of Litigation and its co-sponsors, the Criminal Justice Section, the Tort & Insurance Practice Section, and the Senior Lawyers Division, recommend that the Association should support a recommendation that all federal appellate courts should (1) take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and (2) permit citation to relevant unpublished opinions.

**B. Summary of the Issue**

As the number of cases heard and decided by federal appellate courts increased, without a concomitant increase in staffing, funding, or judicial resources, the courts adopted rules concerning the publication and non-publication of their decisions, and set parameters concerning the use and effect of citation to unpublished decisions. A slim majority of federal appellate courts has adopted the rule that decisions not designated for publication not only do not constitute binding precedent, but cannot even be cited for their possible persuasive value. The issue is whether the traditional justifications for this rule are still valid or whether sound litigation reasons exist for allowing citation to unpublished opinions.

115



DRAFT – March 30, 2001

The Report makes the above recommendations because the traditional justifications for the current rules prohibiting citation to unpublished federal appellate court opinions – the increased cost and time to obtain, store and research a growing body of case law, the need for judicial efficiency, and the perceived unfairness to some litigants over access to unpublished opinions – no longer carry substantial weight. Several practical litigation considerations exist to support a departure from the current rules.

First, and perhaps foremost, is the issue of the quality and extent of the record upon which to base a further appeal. Rules barring citation to unpublished decisions prevent a party from creating a complete record of the authorities and prior appellate rulings bearing on a matter.

Second, by restricting the effect and use of such decisions, rules against citation of unpublished decisions also impact the appellate court's ability to provide a complete and instructive record of the court's analysis and rationale for its decision, likewise impacting future proceedings. This impact can be felt both in terms of a court's inability to support its decision by reference to prior (but unpublished) decisions, and in its inability to cite or rely upon such decisions in distinguishing the outcome of another case.

Third, rules against citing unpublished decisions may create anomalous situations in which the prior (but unpublished) decisions of a particular court of appeals are given less weight (or perhaps no weight at all) than (published) decisions of other appellate courts. Both litigants and appellate courts likely would agree that the expectations of the parties and the federal appellate system would be better served where a court's own body of prior decision-making is given proper credence and effect vis-a-vis the decisions of a sister court.

Fourth, the lack of uniformity among the rules and approaches of the various federal appeals courts also is problematic. The same unpublished opinion may be citable for its persuasive value in one circuit court, but not citable in another. This difference in approach is particularly vexing because it could result in situations where an unpublished opinion could be cited to sister courts, but not to the court authoring the opinion.

The fairness and access concerns that historically have been raised to justify rules against citation to unpublished decisions have been diminished by the advances and expansions

115

DRAFT – March 30, 2001

1 in electronic publication and other mass dissemination of unpublished decisions. The  
2 unpublished opinions of most of the federal circuits are available electronically, either on LEXIS,  
3 WESTLAW, CD-ROM, court websites, or in specialized reporters. Overall, access to these  
4 unofficial reporting media has increased, while the cost of collecting, storing and researching has  
5 decreased.

6  
7 C. Impact of the Policy Recommendation  
8

9 Allowing citation to unpublished opinions will help to ensure that judges will give  
10 full consideration to their decisions in all cases, by encouraging more complete analysis in  
11 unpublished opinions as well as allowing parties to make the courts aware of the complete body  
12 of case law that may affect their particular case. In contrast, depriving litigants and courts of the  
13 use of such decisions as precedent or for persuasion may cause disputes or issues that may easily  
14 have been disposed of by reference to such decisions instead to linger or advance. In addition,  
15 the potential deterrent value of a prior adverse appellate decision is, for practical purposes,  
16 eliminated when the decision cannot be cited because it was not published. Finally, citation to  
17 unpublished opinions will deter institutional litigants from attempting to influence the  
18 publication decision to eliminate the effect of unfavorable opinions against them. Thus, citation  
19 to unpublished opinions will benefit judges and litigants alike.  
20

21  
22 D. Opposing Views  
23

24 There are two traditional justifications for preventing citation to unpublished  
25 opinions. First, it is argued that unfettered citation to unpublished opinions would substantially  
26 undermine the purposes of selective publication – reduction of costs and increased judicial  
27 efficiency. Second, there is a concern that allowing citation to unpublished decisions is unfair  
28 because certain litigants would have more access to the body of unpublished opinions than  
29 others. The Report discusses these justifications and concludes that they are no longer valid in  
30 the modern legal profession.  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42